No. 83-1405

In the Supreme Court of the United States

OCTOBER TERM, 1983

HIRAM B. WEBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1405

HIRAM B. WEBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Secretary of the Interior erred in determining that he had not discovered valuable minerals on public land — now located within the city of Phoenix, Arizona — which the City wants to purchase for use as a park, and thus was not entitled to a mining patent for the land.

1. On August 13, 1956, pursuant to the Small Tract Act of June 1, 1938, 43 U.S.C. 682a *et seq.*, the Department of the Interior issued Classification Order 52 classifying the land in question (except for valid mining claims) as suitable for lease and sale for residential purposes.[1] Petitioner responded by filing a verified statement of mining claims, as required by the 1956 reclassification. See generally 30

---

[1]This classification order was later cancelled on June 14, 1965.

U.S.C. 22 *et seq.* Thereafter, a valuation engineer from the Bureau of Land Management ("BLM") examined petitioner's claims. As a result of the examination, on September 25, 1956, BLM filed a contest (Arizona 10013) against nine unpatented lode claims held by petitioner (Lora, Minnie, Victor, Leo No. 2 and No. 4, Turkey Track No. 1 and No. 3, Alta Vista No. 1 and No. 2). On December 23, 1957, a hearing examiner found that four of petitioner's lode claims (Lora, Minnie, Victor and Turkey Track No. 1) were null and void. The examiner dismissed the government's charges against petitioner's five other lode claims (Leo No. 2 and No. 4, Turkey Track No. 3, Alta Vista No. 1 and No. 2) as not supported by a preponderance of the evidence, but did not declare them valid. Pet. App. 1a-18a.

In 1963 and 1964, petitioner filed applications for mineral patents for the five lode claims against which charges were dismissed in 1957, as well as two others (Leo Nos. 1 and 3), asserting a discovery of gold and silver. Petitioner's patent applications excluded two conflicting lode claims (Golden Star lode in conflict with Leo No. 4 and South Extension in conflict with Turkey Track No. 3) and disclosed a conflict with petitioner's own lode claim to Turkey Track No. 4. Petitioner's patent application revealed no other conflicting placer or lode claims.

BLM challenged all seven of petitioner's lode claims. A hearing examiner issued a decision on March 29, 1967, rejecting all of petitioner's patent applications and declaring all seven lode claims null and void for lack of discovery (Pet. App. 19a-47a). After affirmance on an intermediate departmental appeal, the IBLA affirmed on October 15, 1970. 1 I.B.L.A. 67 (Pet. App. 72a-81a). Petitioner did not seek judicial review of IBLA's decision.

On April 26, 1973, BLM withdrew the lands in question from mineral entry and classified them for disposal under Section 1 of the Recreation and Public Purposes Act, 43

U.S.C. 869, and departmental regulations, 43 C.F.R. 2741.2(d). This withdrawal was made in response to a 1971 petition by the City of Phoenix to purchase this land for the proposed 800-acre Union Hills Park. Petitioner did not record any new mining claim locations between the 1970 IBLA decision and the withdrawal of these lands.

2. On August 24, 1976, BLM served petitioner with a Notice of Trespass and Notice to Remove Unauthorized Structures. When petitioner did not comply, the United States brought an action on March 29, 1977, to eject him from the seven unpatented lode claims that the IBLA had declared void. The United States also obtained an order allowing the Arizona Public Service Company to enter and construct a power line to provide electricity for a beacon light needed for safe operations at nearby Deer Valley Airport. Petitioner filed an answer and countercomplaint in which he asserted lawful possession of the seven tracts containing the lode mining claims that had been the subject of the 1963-1970 administrative proceedings. He still did not ask for judicial review of IBLA's final 1970 decision.

On January 23, 1978, the government filed a motion for summary judgment. In his response, petitioner, for the first time, alleged placer claims for granite. At one point petitioner referred to two placer claims "comprising a large portion of the West half of Section 22 * * *," and at another point he alleged the seven lode claim tracts as placer claims. Petitioner asked that the case be remanded to the Department of the Interior for a determination whether he had discovered valuable minerals on either his placer claims or lode claims. Then, on April 28, 1978, more than a year after the United States had filed its complaint, petitioner filed a motion under Rule 15(a) of the Federal Rules of Civil Procedure for leave to file an amended answer and countercomplaint "to clarify the issues before the Court."

In his proposed amended answer and countercomplaint, petitioner for the first time requested judicial review of the 1970 IBLA decision. Petitioner also sought to forestall ejectment by asserting that he had produced and sold granite from placer claims (but he did not specify the location, size or boundaries of these alleged placer claims). In addition, petitioner sought to raise several affirmative defenses that had first been presented in his response to the government's motion for summary judgment. The defenses asserted were: (1) the validity of the Turkey Track No. 3 lode claim by virtue of its location on other unpatented claims; (2) the existence of valid placer claims on the identical lands involved in this action, which petitioner asserted were properly located pursuant to 30 U.S.C. 38; and (3) that the government's ejectment action was barred by principles of estoppel, waiver, and administrative finality.

On September 18, 1978, after a hearing, the district court granted the government's motion for summary judgment and denied petitioner's motion to amend his pleadings. Judgment was entered on March 26, 1979, determining that petitioner had no rights or interest in the seven tracts on which he had asserted lode mining claims. The court did not rule on the alleged existence of placer mining claims. See Pet. App. 89a.

The court of appeals reversed and remanded. 655 F.2d 977 (1981) (Pet. App. 82a-90a, 91a). The court ruled that it could not determine on the existing record whether it was an abuse of discretion for the district court to deny petitioner's motion for leave to amend his plead ings. The court stated that it expressed "no opinion as to whether the record * * * would support findings that [petitioner] acted in bad faith or that prejudice would result from either of his desired amendments, should such findings be made by the district court" (*id.* at 91a). On remand, the district court

entered an order providing, among other things, that petitioner's motion to amend was granted insofar as it attempted to allege a defense of his lode claims comprised in IBLA's October 15, 1970, decision. The government then filed a renewed motion for summary judgment.

By order dated November 9, 1982, the district court granted the government's motion for summary judgment "on the issue of whether the United States Department of the Interior's administrative decision that declared [petitioner's] seven lode claims null and void should be upheld * * *" (Pet. App. 110a). The court sustained the Department's finding. *Id.* at 92a-95a, 98a-110a. The court of appeals affirmed, holding that the district court correctly found that the IBLA's decision was supported by substantial evidence (*id.* at 111a-112a).

3. The decision of the court of appeals is correct and is supported by a long history of consistent administrative and judicial construction of the relevant statutes. It does not conflict with any decision of this Court or of another court of appeals, and accordingly there is no reason for review by this Court.

Petitioner asserts (Pet. 16-20) that the Secretary and the courts applied an incorrect test in determining whether he was entitled to a patent. This contention is wholly without merit. To establish a "discovery" entitling him to a patent, a mineral lode claimant is required to expose physically, within the limits of his claim, a vein or lode of mineral bearing rock in place, which possesses in and of itself a present or prospective value for mining purposes. Speculation or hope of the existence of minerals have repeatedly been held insufficient to obtain a patent. See, *e.g.*, *United States* v. *Coleman*, 390 U.S. 599, 602 (1968).

Petitioner points to nothing that suggests that the correct standard was not applied.[2] Nowhere does the record support a finding that petitioner has actually found a deposit upon which to predicate development. Petitioner himself has admitted that, with the exception of his Leo No. 3 claim, he would need to do further prospecting before he would have reasonable prospects for success in developing a mine (1966 Tr. 324-327). His expert witness, William Crawford, testified that Turkey Track No. 3 required more prospecting (1966 Tr. 256). This testimony demonstrates that the agency and the courts below did not deviate from the established standard in rejecting petitioner's claims. This Court has made clear that evidence showing a "possibility" that land contained minerals sufficient to make it "chiefly valuable therefor" is not enough to satisfy the mining law. See *Chrisman* v. *Miller*, 197 U.S. 313, 323 (1905). A discovery under the mining law is shown by reference to a "prudent mine developer," not a "prudent prospector." *Barton* v. *Morton*, 498 F.2d 288, 291 (9th Cir.), cert. denied, 419 U.S. 1021 (1974).

In short, there is no basis for contending here that the Secretary and the court applied anything other than the well recognized standard for assessing mineral patent claims. To the extent petitioner is asking this Court to reweigh the evidence in this case under the substantial evidence test (see Pet. 20-22), he clearly presents no issue warranting further review. See *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 507 (1978); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

---

[2]Indeed, the language from *Castle* v. *Womble*, 19 Lands Dec. 455 (1894), that petitioner claims was erroneously relied on below appears to be the same as the language that petitioner claims represents the correct standard. See Pet. 16-17.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1984

DOJ-1984-04